Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 5038

BENNIE DEMPS,

Petitioner

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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INDEX

Page:

Opinion below 1

Jurisdiction 1

Questions presented 2

Statement of the case 2

How the federal constitutional questions were raised below 6

Reasons for granting the writ 6

I. The Decision Below Upholding the Trial Court's Limitation on the Cross-Examination of a Key Witness Decides a Substantial Federal Question in a Manner that is Inconsistent With the Applicable Decisions of this Court 6

II. The Decision Below Raised a Significant and Recurring Issue Concerning the Constitutional Implications of the State's Loss or Destruction of Evidence in a Criminal Case 8

Conclusion 10

Certificate of Service 10

Appendix A (Opinion of the Florida Supreme Court)

CITATIONS

Cases:

Brady v. Maryland, 373 U.S. 83 (1963) 9

Davis v. Alaska, 415 U.S. 308, (1974) 7

Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981) 8

Ohio v. Roberts, ___ U.S. ___, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) 7

United States v. Agurs, 427 U.S. 97 (1976) 9

United States v. Alford, 282 U.S. 687 (1931) 7

United States v. Arra, 630 F.2d 836 (1st Cir. 1980) 9

United States v. Augenblick, 393 U.S. 348 (1969) 9

United States v. Picariello, 568 F.2d 222 (1st Cir. 1978) 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BENNIE DEMPS, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The petitioner, Bennie Demps, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court entered in this proceeding on January 8, 1981, rehearing denied on April 15, 1981.

OPINION BELOW

The opinion of the Florida Supreme Court, reported at 395 So.2d 501 (Fla. 1981) appears attached hereto as Appendix A.

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 8, 1981. A timely petition for rehearing was denied on April 15, 1981. An application for extension of time in which to file a petition for writ of certiorari was granted so as to allow filing by no later than July 14, 1981. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(1) Whether the trial court violated petitioner's Sixth and Fourteenth Amendment Rights to confrontation when it refused to allow cross-examination of a key state witness concerning his homosexual relationship with another inmate.

(2) Whether prejudice to a defendant is the sole inquiry to be made by a court in determining whether or not a defendant's right to due process of law has been violated by the state's loss or destruction of evidence.

STATEMENT OF THE CASE

On Labor day 1976, Alfred Sturgis, an inmate at the Florida State prison, was found stabbed in the cell of his homosexual lover, Arthur Copeland. Sturgis was transported from the infirmary at the Florida State Prison (FSP) to the hospital facility at Union Correctional Institute (UCI) (Transcript [hereinafter cited as T.] 540). From there he was transported toward the state prison facility at Lake Butler. En route, the private ambulance carrying Sturgis stopped because of a carbon monoxide leak. The fumes were of such intensity that the E.M.T. attending Sturgis passed out because of them (T. 559). Subsequently, Sturgis was transferred to another ambulance and was taken to Shands teaching hospital in Gainesville where he died some three hours after he had been discovered in Copeland's cell.

On April 5, 1977, petitioner Demps, along with two co-defendant inmates, James Jackson and Harry Mungin, were indicted for the murder of Alfred Sturgis.

During the course of depositions prior to trial defense counsel learned that A. V. Rhoden, a key state's witness,[1/] had given a state's investigator a written statement concerning the

---

1/ A. V. Rhoden is a former correctional officer who testified at trial concerning the dying declaration of Alfred Sturgis which implicated petitioner Demps and the other inmates.

Sturgis killing immediately after the incident. The statement was given at the investigator's insistence. (Record [hereinafter cited as R.] 192). Throughout the pretrial proceedings, the defendant's counsel made numerous requests for production of the statement. On March 2, 1978, the trial court ordered the state's attorney to furnish petitioner's counsel with Rhoden's statement (R. 171).

On March 6, 1978, counsel for the co-defendants Mungin and Jackson deposed state investigator R. K. Griffiss who testified that he had made a thorough search, and that the file which contained Rhoden's written statement, together with the written statement itself, had been misplaced--"not lost, misplaced" (R. 181-83). Immediately prior to trial, counsel for petitioner and the co-defendants filed a motion to dismiss the indictment based inter alia on the prejudicial effect of the state's negligent or wanton failure to provide the defendant's counsel with A. V. Rhoden's statement (R. 175-178). The motion was denied, after lengthy argument. (T. p. 24). A motion to suppress Rhoden's testimony was also denied (T. 776-777; 793).

At trial, the state's case against the petitioner was presented, in the main, by two witnesses, Officer A. V. Rhoden and an inmate, Larry Hathaway. Officer Rhoden testified that Sturgis, the deceased told him,

> "You have to get Mungin and Demps,
> they held me and Jackson stabbed me"

(T. 543).

Defendants, prior to the introduction of Officer Rhoden's testimony, offered strenuous objections to the use of this alleged dying declaration. As a result, the trial court required the state to proffer Rhoden's testimony as a prerequisite to an admissibility ruling (T. 480-539).

The evidence presented at the proffer showed that the dying declaration was made to Officer Rhoden alone, after the ambulance in which the deceased was riding had stopped because of carbon monoxide fumes. Immediately prior to this statement

to Rhoden, Sturgis was in stable condition, and had not expressed any belief that he was about to die (T. 517). The trial judge permitted the dying declaration to be used as evidence over defense objection (T. 535).

Larry Hathaway, the state's other key witness, was an inmate at the Florida State Prison at the time of the Sturgis homicide. He was subsequently transferred to Union Correctional Institute, the Panama City, Florida jail and to Quincy Correctional Facility, where he was assigned at the time of trial[2/] (T. 728-29). He was also a "three time loser" (T. 754).

Hathaway testified that on the day in question he had been on the third floor of "W" wing and that immediately after chow call, he had been informed by defendant Harry Mungin that "he was fixing to get rid of a snitch" (T. 719). Hathaway further testified that he left, then returned to the third floor and was walking down the hall when he saw Mungin in the doorway of Arthur Copeland's cell (T. 722-723). Hathaway continued past Mungin to his cell, which was across from Copeland's, where he again observed Mungin in the doorway and Jackson and appellant Demps inside the cell. Hathaway stated that he saw "a struggle going on between Inmate Demps and Inmate Jackson and Inmate Sturgis" (T. 723). He futher noted

> When I looked into the cell, Inmate Mungin was in the door and directly behind him was Inmate Demps and behind him was Inmate Jackson. As I looked into the cell I saw this struggling going on, I observed Inmate Jackson's arm in a motion coming down like this (indicating), as if he was hitting, whatever, to the inmate.

(T. 726).

Hathaway testified that after observing this scene he turned around and left the wing.

2/ Immediately prior to his transfer to the Panama City Jail, he was at the Reception and Medical Center at Lake Butler in the hospital.

Immediately prior to Hathaway's testimony, the court held a hearing outside the presence of the jury to determine, inter alia, the parameters of the cross-examination of Hathaway by defense counsel (T. 643-694). While at the Florida State Prison, Hathaway established a homosexual relationship with an inmate named Robert Zeigler, who was also a state's witness, who in November of 1977 was transferred to Quincy Correctional Institute. Hathaway was also subsequently transferred to Quincy where the relationship again flowered (T. 663). Defense counsel sought by cross-examination to establish the fact that Hathaway and Zeigler were homosexual lovers. The court agreed to permit questions concerning the friendship of Zeigler and Hathaway but precluded further inquiry about their homosexual relationship, remarking "but if you say homosexual relationship I'm going to have someone's head" (T. 686). An objection to the court's ruling was made (T. 689). The court's ruling was particularly damaging in light of Hathaway's testimony that he was transferred for protection (T. 730).

In addition to the testimony of Rhoden and Hathaway, the state offered the testimony of a Dr. Isaacs who testified that the cause of death was from blood loss due to one stab wound.

Petitioner presented no evidence. During the presentation of evidence for the defendant James Jackson, John Chandler, a Florida attorney, testified that he had interviewed Larry Hathaway in October of 1976. At that time, Hathaway told him that at the time of the Sturgis killing he had been in the second floor day room with Mungin and Demps. According to Chandler's testimony, Hathaway further stated that he had received pressure from the state's investigator, Lt. Deese, to testify but that he had told Deese not only that he would not testify against the defendant but further that he would be a defense witness (T. 857-860). Defendant Jackson also offered the testimony of Arthur Copeland and certain evidence from prison files which indicated that Copeland and Sturgis were homosexual lovers, that they had been involved in a serious

physical altercation one year prior to Sturgis' death, and that during the year prior to his death and even up to the date of his death they could not get along (T. 871-879; 895-898).

The jury retired at 11:05 a.m. on March 16, 1978 and returned at 8:55 p.m. with verdicts of guilty of first degree murder against each defendant.

The jury sentencing hearing was held the next day.

Following deliberations, the jury recommended death sentences for petitioner Demps and defendant James Jackson and a life sentence for Harry Mungin. The trial judge did not follow the jury recommendation as to Jackson, and sentenced him to life imprisonment (R. 220). Petitioner Demps, alone, was sentenced to death.

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED BELOW

Petitioner's federal constitutional challenge to the state's failure to produce the written statement of A. V. Rhoden was presented to the Florida Supreme Court and was rejected by that court on the merits. (App. A, p. 4). Petitioner's constitutional challenge to the limitation placed on his cross-examination of Larry Hathaway was similarly presented and rejected. (App. A, p. 5).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UPHOLDING THE TRIAL COURT'S LIMITATION ON THE CROSS-EXAMINATION OF A KEY WITNESS DECIDES A SUBSTANTIAL FEDERAL QUESTION IN A MANNER THAT IS INCONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Larry Hathaway was the key witness for the State of Florida in the presentation of its case against petitioner. He was the only alleged eye-witness. Prior to Hathaway's testimony, defense counsel informed the court that it would seek to impeach Hathaway's testimony through questions

concerning his homosexual relationship with an inmate named Robert Zeigler. There was no question that such a relationship existed[3/] (T. 643-689). Such an inquiry would have permitted the defense counsel to show bias, i.e, that Hathaway was testifying in exchange for the state-provided transfer to "Cooks and Baker School" at Quincy so he could be with his homosexual lover. The inquiry would also have allowed the petitioner to counter the state's argument presented through Hathaway's testimony that he was transferred to Quincy for "protection"[4/] (T. 730).

The trial court precluded any inquiry into the homosexual relationship between Zeigler and Hathaway and stated that he would have someone's head if any defense counsel approached that area in cross-examination (T. 686). The result of the trial court's ruling was that the petitioner was precluded from effective cross-examination. In Davis v. Alaska, 415 U.S. 308, 316 (1974), this Court noted that "cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested."

More recently, describing cross-examination as the greatest legal engine ever invented for the discovery of truth," this court stated that "... one critical goal of cross-examination is to draw out discrediting demeanor to be viewed by the fact-finder." Ohio v. Roberts, ___ U.S. ___, 100 S.Ct. 2531, 2537 n. 6, 65 L. Ed. 2d 597 (1980). Thus, "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness." Davis v. Alaska, 415 U.S. at 316.

This Court has repeatedly indulged a presumption in favor of free cross-examination, United States v. Alford, 282 U.S. 687, 692 (1931) and lower federal courts have emphasized the

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3/ Deposition testimony presented to the Court clearly established that Hathaway and Zeigler had an ongoing homosexual relationship (T. 633), and that the chief state's investigator contacted Zeigler after Hathaway had given him his name.

4/ Hathaway testified at trial that he was transferred for his personal protection.

importance of free cross-examination where, as here, the witness the accused seeks to cross-examine is the "star witness" for the prosecution. See, e.g., Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981).

In spite of this clear mandate from this Court favoring wide latitude in cross-examination, the Florida Supreme Court upheld the trial court's cross-examination limitation. It did so in spite of the fact that without the court-imposed limitation petitioner could have shown the jury that a homosexual relationship existed between the key state witness and another inmate, thus giving them sufficient reason to believe that

a) the witness' first statement exculpating petitioner was the correct one and that, through the offices of the state, he had agreed to change his story to obtain a transfer to his homosexual lover, and

b) the witness was transferred not for his protection as he testified but rather as a quid pro quo for his testimony so as to enable him to be with his homosexual lover.

Because of the court's imposed limitation, however, petitioner was denied the opportunity of presenting this crucial evidence to the jury.

The decision of the Florida Supreme Court is manifestly inconsistent with the cross-examination decisions of this court and should be reviewed.

II. THE DECISION BELOW RAISED A SIGNIFICANT AND RECURRING ISSUE CONCERNING THE CONSTITUTIONAL IMPLICATIONS OF THE STATE'S LOSS OR DESTRUCTION OF EVIDENCE IN A CRIMINAL CASE

While the Court has consistently addressed the constitutional dimensions of the state's failure to disclose exculpatory information to the defense, see United States v. Agurs, 427 U.S.

97 (1976); Brady v. Maryland, 373 U.S. 83 (1963), it has not defined the constitutional significance of the state's loss or destruction of evidence.

In United States v. Augenblick, 393 U.S. 348 (1969), the Court addressed the question of lost evidence under the Jencks Act, but in dicta articulated a very broad "fundamental fairness" standard as the constitutional requirement. Id at 356. Following Augenblick certain lower federal courts have articulated a three-pronged test for determining whether a defendant's due process rights have been prejudiced by the destruction of evidence. United States v. Arra, 630 F.2d 836 (1st Cir. 1980). Under that test, the following are to be considered:

> [F]irst, was the evidence material to the question of guilt or the degree of punishment; second, was defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence.

United States v. Picariello, 568 F.2d 222, 227 (1st Cir. 1978).

The primary thrust of the Florida Supreme Court's opinion rejecting petitioner's contention was that there was no demonstration of prejudice. Under the proper constitutional analysis, the Court should have made a three-pronged inquiry, such as that recommended in United States v. Picariello, supra, and balanced the delicate interests of the state and defendant which are involved. Had the proper balancing occurred petitioner's conviction should have been reversed. The failure of the Florida Supreme Court to make the proper constitutional inquiry underscores the need for this Court's examination of this important issue concerning constitutional implications of the state's loss of evidence in a criminal trial and the proper standard to be applied to determine whether a due process violation has occurred.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Florida Supreme Court.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 1981, three copies of the petition for Writ of Certiorari and the Motion to Proceed in Forma Pauperis, were served on Miguel Olivella, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301, counsel for the respondent.

I further certify that all parties required to be served have been served.

Attorney for Petitioner

circumstance under section 921.141(5)(b), Florida Statutes (1977). This question has not previously been addressed directly by the Court. *But see McCrae v. State*, —— So.2d ——, No. 45,894 (Fla. Oct. 30, 1980) (*plea of guilty*, as opposed to a nonfinal conviction, to a violent felony without adjudication of guilt an aggravating circumstance under section 921.141(5)(b)). For aid in determining what constitutes a "conviction" under this section, I would utilize the interpretation of that term under section 775.084, Florida Statutes (1975), our habitual offender statute, because the purposes of both that statute and section 921.141(5)(b) are similar–to enhance punishment due to prior criminal convictions. Under section 775.084, a prior conviction is not final until appellate review has concluded. *Joyner v. State*, 158 Fla. 806, 30 So.2d 304 (1947); *Garrett v. State*, 335 So.2d 876 (Fla. 4th DCA 1976); *Coleman v. State*, 281 So.2d 226 (Fla. 2d DCA 1973). In view of the similarity in underlying philosophy between the two statutes, and in view of the awesome finality of the death penalty, I would hold that for purposes of section 921.141(5)(b) a prior conviction may not be utilized in aggravation until direct appellate review has concluded. I am unpersuaded by the majority's reliance on the fact that the convictions in this case were affirmed pending this appeal. What if they remained unresolved on the date of this opinion? It occurs to me that the wisdom upon which section 775.084 is bottomed should not be lightly regarded. Because of the unique attributes of the death penalty, we have engaged in a narrow construction of chapter 921 when a question as to its meaning has arisen. *See Elledge v. State*, 346 So.2d 998 (Fla.1977) (section 921.141(5), Florida Statutes (1975), construed to permit only consideration of enumerated factors as aggravating circumstances). Adherence to this rule of construction indicates to me that finality of conviction for purposes of section 921.141(5)(b) should be at least as stringent as for section 775.084, where the consequences are not nearly so grave.

ENGLAND, J., concurs in so much of this dissent as would reverse appellant's conviction.

Bennie DEMPS, Appellant,

v.

STATE of Florida, Appellee.

No. 54249.

Supreme Court of Florida.

Jan. 8, 1981.

Rehearing Denied April 15, 1981.

Defendant was convicted and sentenced to death by the Circuit Court, Bradford County, Wayne M. Carlisle, J., for murder. The Supreme Court held that: (1) State did not violate rules of discovery and deprived defendant of valuable tool for cross-examination by not producing written statement of conversation of state's witness with victim en route to hospital where State made adequate and uncontroverted explanation that statement had disappeared; (2) where nothing in record indicated that witness' written statement varied from his testimony at trial, or absence of written statement prejudiced defendant in his defense in any way, loss of written statement did not impinge upon defendant's right to fair trial; (3) refusal of trial court to let defense cross-examine state's witness on witness' homosexuality was not abuse of discretion or error; (4) trial court erred in finding, as aggravating circumstances, that murder was "conscienceless or pitiless" and set "apart from norm of capital felonies," and that murder was committed for purpose of avoiding or preventing lawful arrest; (5) trial court's improper consideration of aggravating circumstances which were not proven did not render death sentence invalid where two valid aggravating cir-

cumstances were counterbalanced by no mitigating circumstances; and (6) record supported judge's determination that defendant was especially deserving of death sentence.

Affirmed.

1. Criminal Law ⇐627.5(5)

State did not violate rules of discovery and deprive defendant convicted of murder and sentenced to death of valuable tool for cross-examination by failing to produce written statement of conversation state's witness had with victim en route to hospital, where State made adequate and uncontroverted explanation that statement had been misplaced and could not be produced. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220(j)(1).

2. Criminal Law ⇐1166(1)

Loss of written statement of state's witness of conversation of state's witness with victim en route to hospital did not impinge upon right to fair trial of defendant convicted of murder and sentenced to death where nothing in record indicated that written statement varied from testimony of witness at trial, or that absence of written record prejudiced defendant's defense in any way. U.S.C.A.Const. Amend. 6.

3. Witnesses ⇐270(2)

Trial court conclusion that inflammatory and prejudicial effect of evidence relating to homosexuality of prosecution witness far outweighed its relevance, and was not within permissible scope of cross-examination, was not abuse of discretion or error.

4. Criminal Law ⇐1038.1(3)

Where defense contentions, that trial court's instructions on mitigating circumstances were improper in that they mandated death penalty if no mitigating circumstances were found, and that they limited consideration of mitigating factors to those statutorily enumerated, were not raised by defense at trial, they were not reviewable by Supreme Court. West's F.S.A. § 921.-141.

5. Criminal Law ⇐796

Standard jury instructions do not limit jury consideration to statutorily enumerated mitigating circumstances in determining sentence for capital felony of life imprisonment or death. West's F.S.A. § 921.141.

6. Homicide ⇐354

Murder in which defendant held victim while codefendant stabbed victim was not so "conscienceless or pitiless" that it was "set apart from norm of capital felonies" so as to render it "especially heinous, atrocious, or cruel" to qualify as aggravating circumstance in setting sentence for capital felony. West's F.S.A. § 921.141(5)(e, h).

7. Homicide ⇐354

Evidence, in prosecution of defendant for murder in which he was sentenced to death, did not establish beyond a reasonable doubt that murder was committed for purposes of avoiding or preventing lawful arrest pursuant to statute defining aggravating circumstances for determining sentences in capital felonies. West's F.S.A. § 921.141.

8. Homicide ⇐354

Where two valid aggravating circumstances were counterbalanced by no mitigating circumstances, trial court's improper considerations of two other aggravating circumstances which were not present in prosecution for murder of defendant in which he was sentenced to death did not render death sentence invalid. West's F.S.A. § 921.141.

9. Criminal Law ⇐983

Although equally culpable defendants should receive equal sentences, trial judge may take into consideration quality of aggravating circumstance applicable to each defendant. West's F.S.A. § 921.141(5)(a, b, e, h).

10. Homicide ⇐354

Record, in prosecution for murder, in which defendant had held victim while codefendant stabbed victim, supported judge's determination that defendant was especially deserving of death sentence.

John L. Carroll, Montgomery, Ala. and Julius Williams, Orlando, for appellant.

Jim Smith, Atty. Gen. and Miguel A. Olivella, Jr., Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This case is properly before us[1] on direct appeal from the Circuit Court for the Eighth Judicial Circuit. Appellant Demps was convicted and sentenced to death for the slaying of Alfred Sturgis.[2] For the following reasons we affirm the conviction and sentence.

On September 6, 1976, personnel at the Florida State Prison discovered inmate Alfred Sturgis in a cell, bleeding profusely from stab wounds. He was rushed first to the hospital at Union Correctional Institute, then to the state prison at Lake Butler. Due to inadequate facilities at both institutions, Sturgis was taken to Shands Teaching Hospital in Gainesville, where he died soon after arrival.

A grand jury indicted inmates Bennie Demps, James Jackson and Harry Mungin for the murder of Alfred Sturgis. In the course of preliminary depositions, defense counsel learned that while en route to the hospital, Sturgis told correctional officer A. V. Rhoden that appellant, Jackson and Mungin had committed the knifing. Rhoden later reduced the statement to writing and included it in a report filed with R. K. Griffis, a Department of Corrections investigator. After defense requests to produce the written document, the state informed the court that Mr. Griffis had misplaced Rhoden's statement. In a pretrial hearing the court refused to dismiss the indictment based on the state's failure to produce Rhoden's report.

At trial Mr. Rhoden explained to the jury what Sturgis had told him in the ambulance:

Q [Mr. Elwell] All right. What happened after that?

A He [Sturgis] reached up and took my hand and . . .

Q Were you standing up, Mr. Rhoden?

A Yes, sir.

Q And would you indicate how he reached up and took your hand?

A He just reached his hand up, picked his arm up, it was laying down on the stretcher, and he just picked it up and taken my hand.

Q And did you note anything about his appearance in addition to what you just testified to?

A He was chalky looking.

Q All right.

A His eyes was rolling back and forth in his head.

Q And other than grabbing your hand, did he do anything else?

A Yes, sir. He told me, he said:

"Mr. Rhoden, you got to help me. I don't believe I'm going to make it."

And I said: "You got to, Sturgis."

He said: "I don't think I will."

I said, "You got to, you got to help me get the ones that done it."

And he said: "Well, you have to get them for me."

Q Did he say anything else?

A Yes, sir, he said:

"You have to get Mungin and Demps, they held me and Jackson stabbed me."

I asked him, "Which Jackson?"

And he said: "Toothless Jackson."

Q How long did this statement take, from the time that he grabbed your hand and said:

"Mr. Rhoden, I don't believe I'm going to make it."

until he finished; how long did that statement take?

1. Art. V, § 3(b)(1), Fla.Const. (1972).

2. Appellant's codefendants, Harry Mungin and James Jackson, were convicted of first-degree murder but sentenced to life imprisonment for the same offense. Their convictions and sentences are not before us today, though the disparity of sentences among the three defendants will be addressed later in the opinion.

A Just a very short time.

Q Were there any interruptions by any person during the giving of that statement to you?

A No, sir.

Another witness for the prosecution, fellow inmate Larry Hathaway, testified that while walking past Harry Mungin's cell on the afternoon of the murder, Mungin told him to go downstairs and stay there, because Mungin "was fixing to get rid of a snitch." He followed Mungin's suggestion but returned a short while later, at which time he noticed a struggle going on in the cell in which Sturgis was later found. Mungin was standing in the door of the cell; inside, Hathaway could see appellant holding Sturgis down on the bed while Jackson struck him with downward thrusts. Upon seeing this, Hathaway quickly left the scene.

Defense counsel sought to impeach Hathaway's testimony by showing that Hathaway was a homosexual, on the premise that Hathaway implicated the codefendants in exchange for a transfer to the prison where his lover, Robert Ziegler, resided. The trial court held that Hathaway's homosexuality was inflammatory and irrelevant and limited questioning to whether Ziegler and Hathaway were "real good friends."

At the sentencing phase the jury recommended sentences of life imprisonment for Mungin and death for Jackson and appellant. The trial judge sentenced Mungin and Jackson to life, but sentenced appellant to death.

[1] Appellant challenges his conviction on three grounds, two of which merit discussion.[3] He first contends that the state violated the rules of discovery and deprived him of a valuable tool for cross-examination by not producing A. V. Rhoden's written statement of his conversation with Sturgis en route to the hospital.

Concededly, Florida Rule of Criminal Procedure 3.220(j)(1) authorizes a trial judge to impose a broad range of sanctions against a party for nonproduction of discoverable material.[4] But we disagree with appellant's conclusion that the state was in breach of a discovery rule in this case. In response to the trial court order compelling discovery of Rhoden's report, the state made an adequate and uncontroverted explanation that the statement had simply disappeared. In fact, the evidence suggests that the state attorney never had access to Rhoden's statement. Mr. Griffis testified that shortly after placing the report in his personal investigative file, he lost the file, which presumably to this day remains missing. Under these peculiar circumstances, the state should not be held accountable for the nonproduction of the misplaced document.

[2] Nor can it be said that the loss of Rhoden's statement impinged upon appellant's right to a fair trial. While *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), hold that in certain instances a criminal defendant may be deprived of a fair trial by prosecutorial suppression of evidence, the evidence must be material to guilt or innocence, and its omission must have caused prejudice to the accused. There is nothing in this record to indicate that Rhoden's written statement varied from his testimony at trial, or that its absence prejudiced his defense in any other way. *See State v. Sobel*, 363 So.2d 324 (Fla.1978); *Salvatore v. State*, 366 So.2d 745 (1978).

3. We have, of course, carefully reviewed appellant's argument concerning certain photographic evidence, but find it unpersuasive.

4. (j) Sanctions
(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order such party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

[3] We are similarly unpersuaded that the court erred in forbidding reference to Larry Hathaway's homosexuality on cross-examination. A trial judge enjoys broad discretion in determining the permissible scope of cross-examination. *Ho Yin Wong v. State*, 359 So.2d 460 (Fla.3d DCA 1978); *Raisden v. State*, 203 So.2d 194 (Fla.4th DCA 1967). The trial court here quite properly concluded that the inflammatory and prejudicial effect of evidence relating to Hathaway's homosexuality far outweighed its dubious relevance. *See Proffitt v. State*, 315 So.2d 461 (Fla.1975).

[4, 5] With regard to the imposition of the death sentence, appellant takes issue with the trial court's instructions on mitigating circumstances in two respects, that they improperly mandated the death penalty if no mitigating circumstances were found, and they limited consideration of mitigating factors to those statutorily enumerated. Since these issues were not raised by defense counsel at trial, they are not reviewable here. *Castor v. State*, 365 So.2d 701 (Fla.1978); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Douglas v. State*, 328 So.2d 18 (Fla.1976). In any event, we note that the instructions tracked Florida's Standard Jury Instructions and in no way called for a mandatory death sentence. And as we have recently stated on two separate occasions, the instructions do not limit jury consideration to the statutorily enumerated mitigating circumstances. *Peek v. State*, 395 So.2d 492 (Fla.1980); *Songer v. State*, 365 So.2d 696, 700 (Fla.1978).

[6, 7] The trial court found four aggravating circumstances apolicable to this case.[8] Two of these findings are erroneous.

8. The trial court's findings with respect to these four aggravating circumstances are as follows:

1. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT.

As pointed out in mitigating circumstances one, at the time of this murder Defendant Demps was serving two consecutive life sentences having been spared death when the death penalty in Florida was declared unconstitutional plus 20 years for his attempt to kill the third victim. It is the Court's opinion that this is a strong aggravating circumstance.

2. AT THE TIME OF THE CRIME FOR WHICH HE IS TO BE SENTENCED THE DEFENDANT HAD BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL OFFENSE OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO SOME PERSON.

Again as pointed out in mitigating circumstances one and aggravating circumstance one, Defendant Demps had previous convictions as contemplated by this aggravating condition. The evidence showed that Defendant Demps locked three innocent persons in the trunk of one of the victims' automobiles and at close range repeatedly fired a rifle through the trunk into the bodies of the trapped victims killing two and wounding the third one, the heinous details of which are set forth in the presentence investigation considered by the Court in this case. It is the Court's opinion there are extreme aggravating circumstances under this condition.

5. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The evidence in this case showed Defendant Demps was eliminating a "snitch." There is no evidence as to what this victim knew or why he was senselessly murdered. It may be assumed that the victim knew something and that whatever he knew had to be forever put to rest. It is the Court's opinion that there is a mild aggravating circumstance under this condition.

8. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN, UTTER INDIFFERENCE TO OR ENJOYMENT OF THE SUFFERING OF OTHERS; PITILESS.

Defendant Demps senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated total disregard for the life and safety of victim Alfred Sturgis. It was especially cruel because the victim has been denied his right to live and his right to return to society, his family and friends after payment for the crime he committed which resulted in his imprisonment; and the fact

We do not believe this murder to have been so "conscienceless or pitiless" and thus set "apart from the norm of capital felonies"[6] as to render it "especially heinous, atrocious, or cruel."[7] *See Lewis v. State*, 377 So.2d 640 (Fla.1979); *Cooper v. State*, 336 So.2d 1133 (Fla.1976); *Tedder v. State*, 322 So.2d 908 (Fla.1975). Secondly, though there was some evidence to show that the murder was committed for the purpose of avoiding or preventing a lawful arrest,[8] it surely cannot be said that the evidence established this factor beyond a reasonable doubt. *See State v. Dixon*, 283 So.2d 1, 9 (Fla.1973); *Phippen v. State*, 389 So.2d 991 (Fla.1980).

[8] There remain, however, two valid aggravating circumstances[9] counterbalanced by no mitigating circumstances. Since death is presumed in this situation,[10] the trial court's improper consideration of the factors discussed above does not render the sentence invalid:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors *where there are no mitigating circumstances*. The absence of mitigating circumstances becomes important, because, so long as there are *some* statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute.

Elledge v. State, 346 So.2d 998, 1002-03 (Fla.1977) (emphasis in original).

[9, 10] Appellant's final attack centers on the disparity of sentences imposed upon the three codefendants. He cites *Slater v. State*, 316 So.2d 539 (Fla.1975), for the proposition that equally culpable defendants should receive equal sentences. While we agree with and reaffirm the principle enunciated in *Slater*, this is a different case. Nothing in *Slater* prohibits a trial judge from taking into consideration the quality of aggravating circumstances applicable to each defendant.[11] Of these codefendants, only appellant had the loathsome distinction of having been previously convicted of the first-degree murder of two persons and attempted murder of another, escaping the gallows only through the intervention of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The record amply supports the judge's determination that appellant was especially deserving of the death sentence. *See also, Jackson v. State*, 366 So.2d 752 (Fla.1978); *Salvatore v. State*, 366 So.2d 745 (Fla.1978).

Accordingly, the conviction and sentence of death are affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

that he was an inmate does not make his life any less precious than any citizen in a free society.

It is the Court's opinion there are very strong aggravating circumstances under this condition.

6. *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973).

7. § 921.141(5)(h), Fla.Stat. (1979).

8. § 921.141(5)(e), Fla.Stat. (1979).

9. The capital felony was committed by a person under sentence of imprisonment, § 921.141(5)(a), and the defendant was previously convicted of another capital felony, § 921.141(5)(b).

10. *State v. Dixon*, 283 So.2d at 9.

11. *Cf. Elledge v. State*, 346 So.2d 998 (Fla. 1977). (The purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant.)

Opposition

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CASE NO. 81-5038

BENNIE DEMPS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF FLORIDA

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10

TOPICAL INDEX

PAGES

PRELIMINARY STATEMENT. 1

QUESTIONS PRESENTED. 1

STATUTORY PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE AND FACTS. 2

REASONS WHY THE WRIT SHOULD NOT BE GRANTED. 2

QUESTION I. 2

QUESTION II. 6

CONCLUSION. 10

CERTIFICATE OF SERVICE. 11

AUTHORITIES CITED

CASES — PAGES

Alford v. United States,
282 U.S. 687 (1931). 3

Andrews v. State,
56 So. 681 (Fla. 1911). 3

Brady v. Maryland,
373 U.S. 83 (1963). 8, 9

Davis v. Alaska,
415 U.S. 308 (1974). 3

Douglas v. Alabama,
380 U.S. 415 (1965). 3

Douglass v. State,
43 So. 424 (Fla. 1907). 3

Proffitt v. State,
315 So.2d 461 (Fla. 1975). 3, 5

Ray v. State,
262 So.2d 475 (Fla. 3d DCA 1972). 3

State v. Sobel,
363 So.2d 324 (Fla. 1978). 8

United States v. Agurs,
427 U.S. 97 (1976). 8, 9

United States v. Picariello,
568 F.2d 222 (1st Cir. 1978). 9, 10

Wilcox v. State,
299 So.2d 48 (Fla. 3d DCA 1974). 8

OTHER AUTHORITY

Fla.R.Crim.P. 3.220(a). 7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CASE NO. _____

BENNIE DEMPS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the citation to the opinion below and jurisdiction.

QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONTATION WHEN IT REFUSED TO ALLOW CROSS-EXAMINATION OF A STATE'S WITNESS AS TO HIS HOMOSEXUAL RELATIONSHIP WITH ANOTHER INMATE.

II

WHETHER THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE STATE'S INADVERTENT LOSS OF EVIDENCE WHICH WAS NOT MATERIAL AS DEFINED BY CASE LAW.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

Respondent does not accept the Statement of the Case as set forth by Petitioner. Rather, Respondent would rely upon the facts as set forth by the Florida Supreme Court in its opinion reported at 395 So.2d 501 (Fla. 1981).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Respondent submits that neither of the issues tendered by Petitioner raise matters that merit further review by this Court, and for the reasons stated hereinafter, this Court should deny the Petition.

I

WHETHER THE TRIAL COURT VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONTATION WHEN IT REFUSED TO ALLOW CROSS-EXAMINATION OF A STATE'S WITNESS AS TO HIS HOMOSEXUAL RELATIONSHIP WITH ANOTHER INMATE.

Petitioner contends that his right to cross-examination was unduly limited by the trial court when it prevented him from questioning a state witness regarding the witness' alleged homosexual activity with another inmate. Respondent would submit that since the intended cross-examination was irrelevant, immaterial, inflammatory and its possible probative value was outweighed by the humiliation which would have been suffered by the witness, the trial court properly exercised his discretion in limiting it.

Respondent readily acknowledges that cross-examination is a viable legal tool for discovering the truth and that an accused's right to cross-examination should not be unduly restricted. Davis

v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965). However, even this Court's decisions recognize that as a counter-balance, one must consider the possible impact of the intended cross-examination. For example, in Davis, supra, this Court relied upon Alford v. United States, 282 U.S. 687 (1931)[1] and held that while a witness had a right to be protected from exposure of his criminal record:

> "[N]o obligation is imposed on the Court such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him."
> 415 U.S. at 320
> 282 U.S. at 694 (Emphasis added)

Thus, it is readily apparent that while this Court has held that a witness' right to be protected from exposure of his criminal record falls secondary to an accused's right to full cross-examination, the accused's right to cross-examination in turn falls secondary to a witness' right not to be harassed, annoyed, or humiliated.

The decisions from Florida courts are consistent with this Court's interpretation of the Sixth Amendment. Under Florida law, cross-examination is only restricted when it is irrelevant. Andrews v. State, 56 So. 681 (Fla. 1911); Douglass v. State, 43 So. 424 (Fla. 1907); Ray v. State, 262 So.2d 475 (Fla. 3d DCA 1972).

Cross-examination may also be limited when it is an expedition into immateriality or would serve only to confuse the ultimate issue. For example, in Proffitt v. State, 315 So.2d 461 (Fla. 1975), the defendant wanted to establish that the victim was a marijuana dealer and that his death could have resulted from those dealings. In affirming the lower court's decision to limit cross-examination and not allow this testimony to go to the jury,

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[1] Which is also relied upon by Petitioner.

the Florida Supreme Court held:

> ". . . It is clear from reading the record that counsel for appellant was not attempting to impeach or discredit the witness but rather was taking an expedition into immateriality. The trial judge properly exercised the broad discretion allowed him by limiting the scope of cross-examination. Baisden v. State, 203 So.2d 194 (Fla. App. 1967) There is no need to speculate as to the goal of the expedition, however, it is interesting to note that in viewing the evidence sought to be admitted, the only purpose which its introduction would serve would be the confusion of the ultimate issue and the impairment of the fairness of the trial.
>
> 315 So.2d at 464 (Emphasis added)

In the case at hand, Petitioner complains because the trial court would not allow him to ask witness Hathaway whether he and another inmate (one Robert Ziegler) were homosexual lovers. After establishing this alleged homosexual relationship, Petitioner wanted to show that Hathaway and Ziegler were eventually transferred to the same prison in exchange for Hathaway's testimony against Petitioner, not for protection as Hathaway had testified. From this, Petitioner felt that he could establish bias or willingness to lie on Hathaway's part, diminishing Hathaway's credibility.

The preceding scenario is only partially complete, however, as at trial, Petitioner also wanted to establish that not only Hathaway and Ziegler were homosexuals, but that one Arthur Copeland (the last inmate besides Hathaway to see the victim Sturgis alive) and Sturgis (the victim) were also homosexual lovers and that it was really Copeland who killed Sturgis in a "lover's quarrel". Since Hathaway and Ziegler were homosexuals (and for that reason alone), Petitioner contended that Copeland went to Hathaway and Ziegler after the murder and all three conspired to frame Petitioner and his co-perpetrators!

The trial judge allowed Petitioner to establish only what he deemed relevant. In his opinion, it was proper to allow Petitioner to question regarding Copeland and Sturgis' relationship

as it pertained to Copeland's alleged motive (if any) to kill Sturgis. He also allowed Petitioner the opportunity to establish whether Hathaway's transfer was secured in exchange for testifying.[1] He even allowed Petitioner to ask Hathaway whether Hathaway and Ziegler were "real good friends" after establishing that Copeland and Sturgis were homosexuals. The court, however, ruled that any questions relating to whether Hathaway and Ziegler were homosexual lovers would be inflammatory and irrelevant.

There is no question that the court's ruling complied with not only Florida law, but this Court's decisions as well. As with any right afforded to an accused, it can be and often is tempered by such things as the Rules of Evidence. In the instant case, the court allowed full cross-examination up to the point where it served no purpose other than to humiliate the witness. The desired cross-examination was so irrelevant, speculative, and inflammatory as to render it inadmissible. Thus, it was properly excluded.

Additionally, Petitioner sought to undertake an expedition into immaterality much like in Proffitt, supra. Sub judice, the issue sought to be proven was that Hathaway testified in exchange for a transfer to the same prison Ziegler was eventually transferred to. The trial court allowed Petitioner to establish this. The court only restricted Petitioner from questioning Hathaway with respect to his being a homosexual. This was totally irrelevant to show the transfer was not made for purposes of protection as has been previously noted. The record amply documents the fact that:

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[2] Hathaway maintained at trial that it was not in exchange for a transfer, but for his protection. The facts support his testimony as they reflect that Hathaway was first transferred from Florida State Prison to Union Correctional Institution and then to a prison in Quincy, Florida, routinely used by the state for protection of inmates. Some time later, Ziegler was transferred to Quincy. The record further reflects that from the time Hathaway was transferred out of Florida State Prison, there was never any communication between Hathaway and Ziegler. This is understandable since the two men had no reason to communicate with each other. While the two once had a homosexual relationship, they were not involved with each other at the time of the murder. Ziegler had another homosexual "partner" (not Hathaway). In light of the foregoing, it is readily apparent that the desired cross-examination would not have served to establish any reason for Hathaway to lie.

Hathaway was transferred to Quincy long before Ziegler ever was; he was transferred to a prison used routinely for prisoner protection; Hathaway and Ziegler were not homosexual lovers at the time of the murder; and the two had not communicated between the time Hathaway was transferred and Ziegler was transferred.

To the extent that the desired cross-examination was speculative, inflammatory, irrelevant, non-probative, and humiliatory, the trial court wisely curtailed it to the necessary degree. Full and effective cross-examination was allowed, however. Since the trial court's ruling comports with this Court's decisions, this Honorable Court should decline to exercise its discretionary jurisdiction.

II

WHETHER THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE STATE'S INADVERTENT LOSS OF EVIDENCE WHICH WAS NOT MATERIAL AS DEFINED BY CASE LAW.

Appellant alleges that this Hnorable Court should review the case at hand and resolve the constitutional implications of the state's loss of evidence in a criminal trial, setting forth the standard to be applied in order to ascertain whether a violation of due process exists. Respondent would submit that since this Court has already done so, this case clearly does not merit review. And, since the decision of the trial court comports with this Court's decisions, certiorari review should be denied.

The facts as reflected by the record show that one A. V. Rhoden made an oral statement to Ronnie Griffis, a state-employed prison inspector. Rhoden told Griffis that the victim had identified his killers to him (Rhoden) as being the Petitioner here and two other men. Griffis instructed Rhoden to reduce his oral statement into writing. Rhoden complied and gave the statement to Griffis. During a deposition, Griffis was requested to produce the statement

but stated that he did not have it, and to the best of his recollection, had given it to Richard Dees, an institution investigator. Petitioner requested this statement from the prosecutor and he responded that Petitioner would receive it if it existed. Subsequently, Rhoden was deposed by Petitioner and he stated that he had drafted the written statement and had turned it over to the control room. Nevertheless, Petitioner did not receive the statement and eventually filed a Motion to Counsel Discovery. The court granted the motion and ordered the State to produce the statement. Prior to trial, Petitioner deposed Griffis again in order to secure the statement. Griffis testified that he had made a thorough search and the file which contained the statement had been misplaced. Petitioner filed a motion to dismiss based on the fact that he never received the statement which was in violation of the discovery rules. During argument on the motion, the court was made aware of the preceding facts and also of the fact that the prosecutor never saw Rhoden's written statement. The prosecutor did state that the file had not been burned as no files pertaining to the instant case were burned (it seems at one time the file was thought to have been burned). Based on the argument, the court denied the motion and refused to impose any sanctions during the trial.

Fla.R.Crim.P. 3.220(a) sets out the prosecutor's obligation with respect to discovery:

> "(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> * * *
>
> "(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. . ."

(Emphasis supplied)

Brady v. Maryland, 373 U.S. 83 (1963) and Wilcox v. State, 299 So.2d 48 (Fla. 3d DCA 1974) hold that a prosecutor must disclose to the accused any material evidence to his guilt or punishment. Where the evidence has been lost prior to any demand for discovery, the State is precluded from producing it because of sheer impossibility. However, even if one examines what recent decisions have held with respect to what constitutes "material evidence", clearly the written statement here did not fit the definition of "material", and as such, the trial court's ruling was eminently correct.

United States v. Agurs, 427 U.S. 97 (1976) described the requirements of Brady and defined "materiality" which gives rise to a duty if disclosure.

> ". . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

427 U.S. at 109-110.

The State, during argument below, summed up the thrust of Agurs when it told the trial court:

> "There is no evidence, Your Honor, that that statement is inconsistent with whatever written statement Officer Rhoden gave."

The State showed that Officer Rhoden's statement was wholly consistent with his testimony to the best of its ability in light of the circumstances. From the record before the trial court, there was no reason to believe otherwise. Rhoden testified during deposition as to what the victim told him. Griffis testified that Rhoden gave him the written statement and from the testimony there is no reason to believe that the written statement was inconsistent with Rhoden's oral statement. The State clearly showed that the statement would not benefit Petitioner. The Florida Supreme Court has recently held that such a showing is sufficient to demonstrate a lack of prejudice to the accused. State v. Sobel, 363 So.2d 324 (Fla. 1978). As a result, the State satisfied the

requirements of Brady, supra, and Agurs, supra, and this Court need not grant certiorari review of the case at hand.

Petitioner, however, argues that the Florida Supreme Court's disposition of this issue was defective in that the Court's decision only turned on the lack of prejudice suffered by Petitioner. Petitioner relies upon a lower federal court decision which held that when evidence has been destroyed, a three-pronged test should be employed in determining whether due process rights have been violated:

> "[F]irst, was the evidence material to the question of guilt or the degree of punishment; second, was defendant prejudiced by its destruction; and third, was the government acting in good faith when it destroyed the evidence."

United States v. Picariello, 568 F.2d 222 (1st Cir. 1978) at 227.

While Petitioner may contend that the Florida Supreme Court bottomed its decision simply on a lack of prejudice, Respondent would submit that the court's decision indicates otherwise. In disposing of Petitioner's argument below, the Court expressly held:

> Concededly, Florida Rule of Criminal Procedure 3.220(j)(1) authorizes a trial judge to impose a broad range of sanctions against a party for nonproduction of discoverable material.[4] But we disagree with appellant's conclusion that the state was in breach of a discovery rule in this case. In response to the trial court order compelling discovery of Rhoden's report, the state made an adequate and uncontroverted explanation that the statement had simply disappeared. In fact, the evidence suggests that the state attorney never had access to Rhoden's statement. Mr. Griffis testified that shortly after placing the report in his personal investigative file, he lost the file, which presumably to this day remains missing. Under these peculiar circumstances, the state should not be held accountable for the nonproduction of the misplaced document.

> Nor can it be said that the loss of Rhoden's statement impinged upon appellant's right to a fair trial. While Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194; 10 L.Ed.2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.E.2d 342 (1976), hold that in certain instances a criminal defendant may be deprived of a fair trial by prosecutorial suppression of evidence, the evidence must be material to guilt or innocence, and its omission must have caused prejudice to the accused. There is nothing in this record to indicate that Rhoden's written statement varied from his testimony at trial, or that its absence prejudiced his defense in any other way. See State v. Sobel, 363 So.2d 324 (Fla. 1978); Salvatore v. State, 366 So.2d 745 (1978).

Clearly, the court applied the three prong test in reaching a decision as to this issue. The court found: (1) the state did not act in bad faith when it lost the evidence--it was simply lost; (2) the evidence was not material to the case; and (3) Petitioner was not prejudiced. Even if this Court were to adopt the standard Petitioner requests, it would not alter the outcome of this case, and for this reasons, review should not be granted.

And, for the moment, let us assume that Petitioner is correct in maintaining that the Florida Supreme Court's decision turned solely on the lack of prejudice. Respondent would submit that a lack of prejudice is one of the prongs contained in the Picariello test--if there is no prejudice, even if the state acted in bad faith and the evidence was material, in the absence of prejudice, an affirmance is nonetheless warranted.

However, since the state did not act in bad faith and the evidence was not material, Petitioner's argument is unpersuasive.

CONCLUSION

For the foregoing reasons, Respondent would respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MIGUEL A. OLIVELLA, Counsel for Respondent and a member of the Bar of the United States, hereby certify that on the 4th day of August, 1981, I served a copy of the Response to Petition for Writ of Certiorari on John L. Carroll, Counsel for Petitioner, 1001 South Hull Street, Montgomery, Alabama 36104, by a duly addressed envelope with postage prepaid.

MIGUEL A. OLIVELLA, JR.
Assistant Attorney General